

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by
William B. Gray

75-1316

Docket No.

B
P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,)	Appellant
v.)	
MICHAEL PROCAK,)	Appellee

UNITED STATES OF AMERICA,)	Appellant
v.)	
SAMUEL DONALD KNIGHT, a/k/a Michael Procak, a/k/a Donald C. Parker,)	Appellee

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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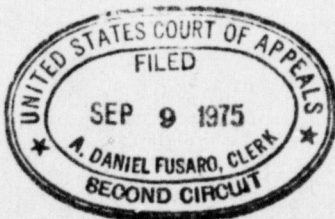


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OF THE DISTRICT COURT PLAN, THE PERIOD
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WHOSE TRUE IDENTITY AND LOCATION WERE
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STATEMENT OF ISSUE

WHETHER THE DISTRICT COURT IMPROPERLY
FAILED TO EXCLUDE FROM COMPUTATION UNDER
§5(d) OF THE DISTRICT COURT PLAN, THE
PERIOD DURING WHICH KNIGHT WAS A FUGITIVE
WHOSE TRUE IDENTITY AND LOCATION WERE
UNKNOWN TO THE GOVERNMENT AND WHETHER,
PROPERLY COMPUTED, AT LEAST ONE MONTH
REMAINED IN THE PERIOD DURING WHICH THE
GOVERNMENT WAS REQUIRED TO BE READY FOR
TRIAL.

APPLICABLE RULES

PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES

(Approved February 28, 1973; Effective April 1, 1973)

Pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure effective October 1, 1972, the judges of the United States District Court for the District of Vermont have adopted the following plan to minimize undue delay and to further the prompt disposition of criminal cases:

* * *

4. All Cases: Trial Readiness and Effect of Non-Compliance.

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. Excluded Periods.

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

* * *

- (d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

* * *

- (g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.
- (h) Other period of delay occasioned by exceptional circumstances.

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June 16, 1975, dismissing the indictments* in these cases, the Opinion and Order of the District Court of June 19, 1975, confirming the Court's oral order, and the District Court's oral order of August 4, 1975 denying the Government's Motion for Reconsideration and Rehearing.**

* Knight was originally charged in CR. NO. 6870 on December 7, 1972 with smuggling merchandise (methaqualone) into the United States. Knight was apprehended in Florida on October 17, 1974 using the name Donald C. Parker and a superseding indictment, CR. NO. 74-100, which charged the methaqualone smuggling as well as an additional methamphetamine violation, and included his aliases as well as his true name, was handed up on November 14, 1974. The Government appeals from the dismissal of these two indictments. A further indictment, CR. NO. 74-101, charging Knight with a violation of the Bail Reform Act also was handed up on November 14, 1974. Knight was found not guilty by a jury in CR. NO. 74-101 on May 15, 1975.

** The Court filed its opinion and order dismissing the indictments on June 19, 1975. The Government concluded after examining the Court's opinion that two arguments had not been considered previously by the Court. The Government did not appeal the dismissals at that time, but rather moved on July 16 for rehearing and reconsideration so as to permit the District Court to consider these arguments. See United States v. Healy, 376 U.S. 75, 77 - 80 (1964); United States v. Roberts, 477 F.2d 57, 58 n.2 (7th Cir. 1973), cert. denied, 417 U.S. 908 (1975); Vine v. Beneficial Finance Co., 374 F.2d 627, 631 - 32 (2d Cir.), cert. denied, 389 U.S. 970 (1967); Gulfstream Shipping Co. v. Collins & Tolson, Inc., 356 F.2d 466, 467 (5th Cir. 1966).

STATEMENT OF FACTS

Samuel Donald Knight, using the name Michael Procak, was arrested on November 29, 1972 in St. Albans, Vermont after he entered the United States from Canada by train (GA*35, 41; TR. of May 13 at 13-14).** Knight gave the name Michael Procak to the Customs Special Agents Neil Lageman and George Klinefelter and produced identification in this name*** (GA 35, 41; TR. of May 13 at 6, 8, 14). Knight volunteered to cooperate with the

*GA refers to the Government Appendix; other references are GX - Government Exhibit and TR. - Transcript.

**The transcripts in this case were prepared at different times by two court reporters and therefore are not all numbered sequentially. Transcript references are to the date the particular transcript begins and the page within that transcript.

***The real Michael Procak, to whom this identification related, testified at the trial in CR. NO. 74-101 that he lost his wallet containing his identification in a bar in New York City in October, 1972.

Customs Agents in providing information with respect to drug trafficking in Montreal and New York (GA 33). Knight was taken before a U.S. Magistrate on November 30, 1972, told the Magistrate his name was Michael Procak and was released on his own recognizance at the request of the Customs Agents (TR. of May 13 at 19 - 20).

Knight was ordered on the bail release form to appear before the Magistrate on December 8, 1972 for a preliminary hearing, however, he destroyed the form before reading it so that it would not be in his possession as he crossed the border into Canada (GA 31 - 32). Knight did not appear on December 8, although no note was taken of this because he had been indicted on December 7, 1972, and the preliminary hearing was unnecessary.

Two notices were sent out by the District Court on January 23, 1973, ordering Knight to appear on January 29, 1973 at 9:30 A.M. at the United States District Court in Burlington for arraignment on CR. NO. 6870, the indictment filed on December 7, 1972 (GX 5, 5A, 5B, 6, 6A, 6B*);

* These exhibits were all introduced during the trial of Mr. Knight in CR. NO. 74-101, for bail jumping. However, Judge Coffrin indicated in his opinion and order filed February 11, 1975 that he considered these notices in rendering his decision in the instant cases (GA 32, 38). Further, Judge Coffrin stated in his opinion and order of June 19, 1975 that he was considering all evidence before him as of that date, including that adduced at the trial in CR. NO. 74-101 (GA 40).

GA 17 - 30). One notice was sent by registered mail to "Michael Procak, 7830 Mountain Sights, Montreal, Quebec, Canada" (GX 5, 5A, 5B; GA 17 - 23), the name and address given by Knight on the bail release form on November 30, 1972.

The other notice was sent by certified mail to "Michael Procak, 125 Mt. Hope Place, Bronx, New York," an address listed on identification Knight had in his possession at the time of his arrest on November 29, 1972. Both notices were returned without having been opened (GX 5, 6; GA 17 - 30).

Knight did not appear on January 29 as ordered and thereafter a Bench Warrant was issued on February 8, 1973.*

* Knight was apprehended in Miami, Florida on October 17, 1974 as he attempted to enter the United States from the Bahamas using a false birth certificate in the name of Donald C. Parker. Immigration officials subsequently ascertained that a warrant was outstanding in Vermont in the name of Michael Procak.

Customs Agent Lageman met with Knight (known to him at all times as Procak) in Montreal on a number of occasions following Knight's return to Canada on November 30, 1972, and in fact met with Knight in Montreal on February 4, 1973 (TR. of May 13 at 24 - 29, 43, 47). Agent Lageman was not aware at that time that Knight had been summoned to appear on January 29, 1973 and had failed to appear. Agent Lageman referred Knight to Customs Special Agent Sidney Bowers, Senior United States Customs Representative in Montreal at the time (TR. of May 13 at 27 - 28, 51 - 52). Agent Bowers first met with Knight on February 4, 1973 (TR. of May 13 at 53). Agent Bowers was aware that Knight had been released on bail on a charge in the United States, but was not aware at that time that Knight had not shown up for a court appearance (TR. of May 13 at 59).

Agent Bowers met with Knight again on February 12, 1973, at which time Knight suggested that he go to Toronto, Ontario and pass on information about narcotic trafficking (TR. of May 13 at 56 - 57). Agent Bowers met with Knight on February 13 and made arrangements for him to contact R.C.M.P. Staff Sergeant Leonard Rozmus in

Toronto following Knight's arrival there (TR. of May 13 at 57). Knight was supposed to call Agent Bowers back but never did so (TR. of May 13 at 57 - 58).

Knight, still using his false name, called Sergeant Rozmus in Toronto and subsequently met with him a few days later (TR. of May 13 at 69 - 70). Knight generally discussed drug trafficking in Toronto with Sergeant Rozmus and was to return with more specific information, but never did (TR. of May 13 at 75 - 76). Sergeant Rozmus had no means of contacting Knight thereafter (TR. of May 13 at 72).

Knight was apprehended as he entered Florida on October 17, 1974 and charged with impersonating another with intent to evade U.S. immigration laws. He was returned to Vermont on December 7, 1974 and his Florida sentence expired on December 17, 1974.

Knight was arraigned before the District Court on December 16, 1974 and entered pleas of not guilty to all indictments. He was remanded in lieu of \$25,000 bail.

The Government filed its Notice of Readiness on January 28, 1975 (GA 6).

Defendant moved for dismissal of the indictments on a number of grounds, one being a violation of the

District Plan for the Prompt Disposition of Criminal Cases. The District Court initially sustained the Government's position in its Opinion and Order of February 11, 1975 (GA 31 - 39), but dismissed the indictments orally on June 16, 1975 (GA 4).^{*} This dismissal was confirmed in the Court's Opinion and Order dated June 19, 1975 (GA 40 - 45).

^{*}Defendant was not tried in CR. NO. 74-101 until May 12, 1975 because of a defense request for a continuance from the February 11, 1975 trial date.

ARGUMENT

POINT I

THE DISTRICT COURT IMPROPERLY FAILED TO EXCLUDE FROM COMPUTATION UNDER §5(d) OF THE DISTRICT COURT PLAN, THE PERIOD DURING WHICH KNIGHT WAS A FUGITIVE WHOSE TRUE IDENTITY AND LOCATION WERE UNKNOWN TO THE GOVERNMENT; PROPERLY COMPUTED, AT LEAST ONE MONTH REMAINED IN THE PERIOD DURING WHICH THE GOVERNMENT WAS REQUIRED TO BE READY FOR TRIAL.

On February 11, 1975, when the District Court initially considered the motion to dismiss for lack of prosecution, it denied the motion based on its findings that when Knight "failed to give his correct name upon his apprehension he put in motion circumstances which misled the prosecution and from which it could properly conclude he was a fugitive when the summons was returned unserved and he failed to appear at the time scheduled for the arraignment." (GA 36 - 37). The Government's basic argument is that this initial decision by the District Court was correct. Knight caused the delay in his own trial by lying about his name and effective address to Customs Agents on November 29, 1972, and continuously thereafter until his disappearance, and to

the United States Magistrate on November 30, 1972, and that he should not be permitted to benefit from his misconduct by invoking the public interest in the prompt adjudication of criminal trials upon which are based the District Court Plan for Achieving Prompt Disposition of Criminal Cases ("District Court Plan"), and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases from which they derive.* Such a result would subvert rather than promote the public confidence sought to be achieved. It is unnecessary, however, for the Court to reach this basic argument because most of the delay falls within a specific exclusion to the District Court Plan.

On June 19, 1975, the District Court granted the defendant's renewed motion to dismiss the indictments "in light of the new evidence which arose during the bail

* See Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (January 5, 1971); and United States v. Flores, 501 F.2d 1356, 1360 n.4 (2d Cir. 1974), (per curiam)

jumping trial, and specifically the testimony of Agent Lageman that he had met with the defendant on February 4, 1973,* some six days after the defendant's scheduled arraignment. . ." (emphasis and footnote added). There is no evidence or suggestion that Knight was contacted or capable of being contacted by United States or Canadian law enforcement officials after he moved to Toronto and broke contact with Agent Bowers and Sergeant Rozmus in late February 1973, "no later than three months from the date of his arrest in any event" (GA 37). **

* As set forth in the Statement of Facts, the Government concedes that Knight met again with another federal agent nine days later on February 13, 1973, the date used in the Government's calculations.

** In its first opinion, the District Court did not find any contact with Knight after his scheduled arraignment on January 29, 1973, two months after his arrest, but used a figure of three months, apparently as an outside calculation. The subsequent contacts found in the second opinion still fall within the three month period initially used by the District Court.

Consequently, by March 1, 1973, approximately three months or 91 days after his arrest, Knight had failed to appear for arraignment, had moved to Toronto from his only known address in Montreal and had terminated all contact with law enforcement agents. Further, a bench warrant had been issued for his arrest under the name Michael Procak.* Consequently, by March 1, 1973, Knight was absent, unavailable within the meaning of §5(d) of the District Court Plan, and the period of time until December 7, 1974, when he was returned to Vermont following his arrest in Miami, should be excluded from computation.** The Government formally indicated its

* Even if the agents had known where to locate Knight, they were without power to execute that warrant in Canada.

** Knight was arrested entering the United States under a false name on October 17, 1974. He was indicted in the Southern District of Florida on October 31, for impersonating another when applying for admission to the United States, and was arraigned there on November 7, 1974. Pre-trial proceedings were held in that court on November 14, 16, 22, 25 and 27. Trial was held on December 2 and the defendant was found guilty by a jury and was sentenced to imprisonment for 60 days or until December 16, 1974. Knight was returned to Vermont immediately following imposition of sentence in the Southern District of Florida, arriving in Vermont on December 7. He was arraigned on December 15, before expiration of his Florida sentence. There has been no claim that Knight's presence in Vermont was not "obtained by due diligence," and thus Knight was "unavailable" from October 17 to December 7 within the meaning of §5(d) and that period is also excusable.

readiness for trial on January 28, 1975, 52 days later. Thus, only 143 days (the original 91 plus the subsequent 52) of the permissible six month period had elapsed and the Government's Notice of Readiness was timely.

This case is controlled by United States v. Flores, 501 F.2d 1356 (2d Cir. 1974) (per curiam). In Flores, this Court was faced with a situation in which slightly more than six months (after exclusions) had elapsed between arrest and the filing of a Notice of Readiness.* Rather than vacating the judgment, however, this Court remanded the case to the District Court to determine under an identical District Court Plan whether during the nine day period between indictment and arrest Flores "was indeed absent (that is, according to the rule, whether his location was unknown) or unavailable

*In Flores, the Government was in fact not ready for trial for more than four months and at one point dismissed the charges for that reason. In Knight's case, however, the proof is simple and the Government has always been in fact ready for trial. No Notice of Readiness was filed until after Knight was arrested in Miami because a Bench Warrant was outstanding and Knight was believed to be a fugitive.

(that is, his location was known but his presence could not be obtained by due diligence) so as to be a fugitive." 501 F.2d at 1360. By contrast, Knight was clearly a fugitive within these definitions from approximately March 1, 1973 until his arrest in Miami.

Following the District Court's Opinion and Order of June 19, 1975, the Government filed a Motion for Reconsideration and Rehearing asserting the same arguments made herein. That motion was denied without further explanation or opinion. In effect, the District Court has charged the Government with the entire period of delay following Knight's two meetings with federal agents in February 1973, apparently on the ground that prior to those meetings the United States Attorney's Office, on one hand, did not notify the Customs Agents that "Procak" had failed to appear and that a bench warrant had been issued, and the Customs Agents, on the other hand, did not notify the United States Attorney's Office that they were meeting with "Procak." While these omissions were certainly unfortunate, they were hardly the cause of the delay. Knight's use of a false name, his failure to appear at the scheduled Magistrate's hearing, his termination by March 1, 1973 of all contact

with law enforcement and his failure ever to check with the District Court to ascertain the status of his case were the cause of the delay. Less than one week elapsed between the issuance of the Bench Warrant on February 8, 1973 and Customs Agents last contact with "Procak" on February 13. By March 1, all contact with Procak was lost and there was no way to contact him, assuming the Government had a duty to do so.

In its Motion for Reconsideration and Rehearing, the Government also urged that the Court should exclude any period during which Knight was cooperating with the Government.

In this regard, the Government argued that Knight indicated following his arrest that he was willing to cooperate with the Government and thereafter met with Government agents on a number of occasions. The facts of his cooperation resemble those present in United States v. Valot, 481 F.2d 22 (2d Cir. 1973). The defendant there cooperated with the Government and then attempted to claim that the Government was not ready for trial within the six months required by Rule 4. The Court of Appeals considered

this aspect of his appeal and stated:

No extended discussion of this aspect of Valot's appeal is required. Appellant's offer of cooperation and the government's acceptance of this offer led to Valot's release on November 24, 1971. From that time until just before the case was presented to the grand jury, the government believed that Valot was cooperating in its efforts to enforce the drug laws. This period of time must be excluded from the computation of the six month period specified in Rule 4. No interest properly protected by Rule 4 would be served by permitting appellant to invoke that Rule in this case. In addition, the possibility of the government's accepting a defendant's offer of cooperation must be protected. This Court will not permit the perversion of the Rules which Valot here attempts. Id. at 25.

The Court concluded that this period of cooperation constituted exceptional circumstances within the meaning of Rule 5(h) of the Rules. See also United States v. Singleton, 460 F.2d 1148 (2d Cir. 1972).*

*Although not argued below, the Government also submits that the case is governed by the exclusion in 5(g) of the District Court Plan because Knight was without counsel. Although the facts underlying this exclusion were not fully developed, it is the established practice in this District for the United States Magistrate to appoint counsel for a qualified person at the time of the initial appearance unless the person wishes to obtain his own counsel.

CONCLUSION

The Opinion and Order of the District Court dismissing Indictments CR. NO. 6870 and CR. NO. 74-100 should be vacated and the cases remanded to the District Court for an immediate trial.*

Respectfully submitted,

GEORGE W.F. COOK
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the District of Vermont,
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States of America


WILLIAM B. GRAY
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September 3, 1975

*Upon remand, the Government will move, pursuant to Rule 48, F.R.Cr.P., to dismiss Indictment CR. NO. 6870, as superseded.

UNITED STATES OF AMERICA,)	Appellant
v.)	
MICHAEL PROCAK,)	Appellee
UNITED STATES OF AMERICA,)	Appellant
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SAMUEL DONALD KNIGHT,)	
a/k/a Michael Procak,)	
a/k/a Donald C. Parker,)	Appellee

I, George W. F. Cook, United States Attorney for the District of Vermont, do hereby certify that I served two copies of the foregoing BRIEF and APPENDIX FOR THE UNITED STATES upon the Appellee by mailing same to his attorney of record, William K. Sessions, III, Esquire, 18 So. Pleasant Street, Middlebury, VT. 05753 this 5th day of September, 1975.


GEORGE W. F. COOK
United States Attorney